SP BOON SENG PROJECT v. PENGARAH TANAH & GALIAN NEGERI KEDAH & ANOR

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[ORIGINATING SUMMONS NO: 24NCVC-05-01-2016]
1 FEBRUARY 2018

LAND LAW: *Transfer – Validity of – Application to transfer land rejected on ground that land situated on Bumiputera lot – Commencement of action by way of originating summons against decision to reject application – Whether action ought to commence by way of judicial review – Whether plaintiff had locus standi to commence action – Whether defendants empowered to impose Bumiputera lot endorsement – Whether defendants acted within powers – Whether Bumiputera lot unconstitutional*

The plaintiff had entered into a sale and purchase agreement with one Nor Asyikin on 29 January 2015. By this agreement, the plaintiff purchased a piece of land ('the land'.) When the plaintiff presented the relevant documents to register himself as the new owner, the application was rejected by the second defendant on the ground that the land fell within the 50% quota for the Bumiputera and was distinct from the Malay Reservation Lands. The said reservation was commonly referred to as Bumi Lot. Aggrieved by the Registrar's rejection to transfer the lands to his name after having paid the full purchase price, the plaintiff filed the present action by way of originating summons ('OS') and sought, *inter alia*, that (i) the decision of the defendants in setting aside the presentation of transfer of title be set aside; (ii) the endorsement of 'Lot Untuk Orang Melayu' on the said land be declared null and void; and (iii) the defendants be prevented from endorsing 'Lot Untuk Orang Melayu' on the register document of title of the said land. The plaintiff further contended that the said 'Bumiputera Lot' was a discrimination on ground of race against the plaintiff and, therefore, unconstitutional and in breach of art. 8 of the Federal Constitution ('FC'). In opposing the OS, the defendants raised both procedural and substantive issues. The procedural issues raised was that the plaintiff ought to have commenced the proceedings by way of a judicial review as the plaintiff was challenging the decision making of the State Executive body. Secondly, the plaintiff had failed to show that it had the *locus* to institute the instant case as Nor Asyikin was the registered owner. It was also the contention of the defendants that the defendants were empowered by art. 153 of the Federal Constitution and ss. 5 and 124 of the National Land Code ('the NLC') to impose the Bumi Lot endorsement. The defendants further submitted that as the Bumi Lot is in line with the Federal Government's policy to maintain socio-economic stability

it could not be considered *ultra vires* the Constitution. Thus, the plaintiff's only recourse was to apply to the State Authority to have the Bumi Lot restriction removed. The issues that arose for determination, *inter alia*, were (i) whether the defendants were, in law, empowered to impose the Bumi Lot endorsement; (ii) whether the defendants acted within the limits of their powers; and (iii) whether the Bumi Lot were unconstitutional.

Held (allowing plaintiff's claim with costs):

(1) The plaintiff had executed a contract with Nor Asyikin and this is in the domain of private law. His main relief was that he may be allowed to vest the lands in his name. The other prayers sought are on payment of late charges consequential to a delayed registration. These are ancillary reliefs. Therefore, the respondents' contention that the plaintiff should have commenced its action by way of a judicial review was dismissed. (paras 10 & 11)

(2) The full purchase price had been paid and Nor Asyikin had executed Form 14A signifying her consent to have the land transferred to the plaintiff. Having made the payment, the plaintiff would suffer loss if the defendants were allowed to refuse to register the transfer of the land. Under such circumstance, the fact that it would be aggrieved qualified the plaintiff to institute the present action. (para 12)

(3) The defendants' submission was untenable. It is trite that any act by the Executive must, regardless of how noble the intention behind the act may be, be founded on a legal and lawful provision. It was also necessary that the manner in which the power was exercised was also legally within the confines of the provision. Further, a perusal of art. 153 of the FC shows that the quotas to be reserved under this article related only to positions in the Federal public service, scholarships, exhibitions and other similar educational or training privileges or special facilities given by the Federal Government and for trade or business permit or licence. There was no mention of lands. Therefore, this provision does not support the defendants' submission that the defendants were empowered by art. 153 of the FC to order the Bumiputera Lot endorsement. (paras 21, 22 & 23)

(4) In interpreting limitations of the powers exercisable under s. 124 of the NLC, any conditions imposed in the conversion exercise must relate to the category of land use. The provisions of s. 124 of the NLC cannot be read to mean that the State Authority has the authority to impose the Bumiputera Lot restriction. Therefore, the defendants had failed to show that the State Authority had the power to impose the Bumiputera Lot endorsement. (paras 27 & 28)

(5) The act of imposing the Bumiputera Lot endorsement is *ultra vires* s. 124 of the NLC, it follows then that the endorsement was a nullity. The endorsement must be ignored and could not be permitted to stay on the title. The resultant effect was that there was no restriction on the land. The defendants could not refuse the transfer of the said land. (para 31)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Cayman Developments (K) Sdn Bhd v. Mohd Saad Long & Ors [1999] 3 CLJ 601 HC ***(foll)***

Nyong Chin Khean & Yang Lain lwn. Pendaftar Hakmilik Tanah, Kedah Darul Aman [2015] 3 CLJ 1144 HC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 8, 153

National Land Code, ss. 5, 124

Other source(s) referred to:

Judith Sihombing, *The National Land Code – A Commentary, Lexis Nexis,* p xii 304

For the plaintiff - SK Ng; M/s Syarikat Ng & Anuar

For the defendants - Nurulashikin Mahadzir; FC

Reported by Sandra Gabriel

JUDGMENT

Chan Jit Li JC:

[1] The plaintiff is a company.

[2] The first defendant is the Director of Lands and Mines of the State of Kedah whilst the second defendant is the Registrar of Land Titles of the State of Kedah.

[3] The plaintiff had entered into a sale and purchase agreement with one Nor Asyikin bt Ahmad Alawi ('Nor Asyikin') on 29 January 2015. By this agreement, the plaintiff purchased a piece of land identified as Lot 1285 in land title no. 181545 Seksyen 6 Bandar Gurun, (hereinafter to be referred to as 'the land'.)

[4] When the plaintiff presented the relevant documents to register himself as the new owner, the application was rejected by the second defendant. The rejection was communicated by the Registrar to the plaintiff by way of the following letter:

A Pejabat Pengarah Tanah dan Galian
Bangunan Wisma Negeri
Alor Setar Telefon : 04-7322644
05576 Kedah Fax : 04-7322432

B Ruj Tuan :

Ruj Kami :

Tarikh : 11/11/2015

C SYARIKAT NG & ANUAR (SG PETANI)
No. 65-A, 2nd Floor, Jalan Pengkalan,
Taman Pekan Baru, Sungai Petani
08000 Kedah

Tuan/Puan,

Penolakan Perserahan Di bawah Seksyen 298 Kanun Tanah Negara

D Saya diarah merujuk kepada perkara di atas dan dimaklumkan bahawa dokumen-dokumen yang tuan serahkan pada 09/11/2015 di dalam perserahan No : 20487/2015 Urusan : Pindahmilik Tanah

Ke atas hakmilik

E BANDAR GURUN GRN 181545

Telahpun ditolak atas sebab-sebab seperti berikut:

i) Lot untuk orang Melayu.

2. Tuan/puan atau wakil tuan/puan bolehlah datang mengambil dokumen-dokumen tersebut di pejabat ini pada bila-bila masa waktu
F pejabat.

Sekian dimaklumkan, terima kasih.

Saya yang menurut perintah.

...

G (Rahayu Binti Abd Rahman)

Pendaftar Hakmilik Tanah/
Pentadbir Tanah Daerah

[5] The defendants' affidavit-in-reply was affirmed by one Muhammad
H Hakimi bin Jamil a Registrar of Titles of the State of Kedah. He explains that Kumpulan Jerai Sendirian Berhad ('Jerai') was the original registered owner of the land. On 16 August 1988, Kumpulan Guthrie Berhad ('Guthrie') in its pursuit to build low costs houses on the land undertook among others to sell 50% of the constructed houses to 'Bumiputeras.' (There is, however, no
I explanation why the application for development is given by Guthrie.)

Guthrie's application was approved subject to several conditions which, amongst them, according to para. 12 of the defendants' affidavit-in-reply were that:

> 2.3 Kuota penjualan rumah-rumah yang dibinakan dalam Projek Perumahan ini hendaklah sekurang-kurangnya 50% kepada Bumiputera.
>
> 2.6 Menerima penyerahan plot-plot 1.4, 15-43, 79-91, 92-134 dan 167-177 sebagai **Tanah Simpanan Melayu**. (emphasis added)

The land in this dispute falls within the 50% quota for the Bumiputera (para. 2.3) and is distinct from the Malay Reservation Lands (para. 2.6.) The said reservation is commonly referred to as Bumi Lot. There is no dispute that this endorsement was within the knowledge of the plaintiff at the time of purchase.

[6] Aggrieved by the Registrar's rejection to transfer the lands to his name after having paid the full purchase price, the plaintiff has filed the instant action seeking the following reliefs:

> 1. Bahawa keputusan-keputusan Defendan-Defendan bertarikh 11.11.2015 yang menolak persembahan pendaftaran pindah milik melalui Borang 14A bertarikh 13.02.2015 daripada Nor Asyikin bt. Ahmad Alawi kepada Plaintif di akas/diketepikan dengan serta merta;
> 2. Bahawa Defendan-Defendan dengan serta-merta mendaftarkan dokumen-dokumen pindahmilik (Borang-borang 14A). Masing-masing bertarikh 13.02.2015 daripada Nor Asyikin bt. Ahmad Alawi kepada Plaintif.;
> 3. Plaintif adalah bebas dan dikecualikan daripada membayar apa-apa yuran pendaftaran pindahmilik dan apa-apa denda/penalti lewat (sekiranya ada) yang disebabkan kelewatan pendaftaran pindahmilik tanah-tanah tersebut;
> 4. Catatan "Lot Untuk Orang Melayu" dalam HS(D) 851/90 PT6868 Mukim Gurun, Daerah Kuala Muda, Kedah Darul Aman [selepas ini dirujuk sebagai 'Tanah tersebut'] adalah dibatalkan dengan serta-merta;
> 5. Defendan-Defendan adalah dihalang daripada untuk mengindorskan catatan "Lot Untuk Orang Melayu" di atas Surat Hakmilik Pendaftaran tanah tersebut;
> 6. Bahawa kesemua pihak yang terlibat termasuk tetapi tidak terhad kepada Defendan-Defendan hendak mengambil segala langkah yang perlu dan sewajarnya untuk memberi kesan kepada perintah ini;

A

7. Kos permohonan ini dibayar oleh Defendan-Defendan kepada Plaintif; dan

8. Perintah lain-lain yang difikir sesuai dan berpatutan oleh Mahkamah Yang Mulia.

B **[7]** In opposing the originating summons, Puan Nurul Ashikin bt Mahadzir ('Puan Nurul') the learned Federal Counsel for both the defendants, raised both procedural and substantive issues. The procedural issues raised are, firstly, that the plaintiff ought to have commenced the proceedings by way of a judicial review as the plaintiff is challenging the decision making of the State executive body. Secondly, the plaintiff has failed C to show that it has the *locus* to institute the instant case as Nor Asyikin is the registered owner. And, the said Nor Asyikin is not even made a party in this proceeding.

[8] *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 is instructive on the issue of D determining the mode to move the court. James Foong FCJ in delivering the decision of the Federal Court held (at p. 896 (CLJ); p. 171 (MLJ)):

> [60] In view of the various decisions on this point, particularly that of YAB Dato' Dr Zambry, it is necessary for this court to clarify the law on this 'procedural minefield' (as Lord Lowery puts in *Roy v. Kensington and* E *Chelsea* FPC).
>
> [61] Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law F is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman*). However, O. 53 of the RHC sets out a specific procedure for G an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off H for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* and repeated in *YAB Dato' Dr Zambry*. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to 'particularly where the invalidity of the decision arises as I

a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v. Mackman*. The circumstances in *YAB Dato' Dr Zambry* is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 of the RHC.

[62] We observed that a challenge on the use of appropriate procedure is very much fact-based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

[9] With that, I directed my mind to the following question – which element is predominant in this case? After considering the factual matrix of this case, I conclude that it is private law element which is predominant.

[10] The facts of this case show that the plaintiff had executed a contract with Nor Asyikin and this is in the domain of private law. His main relief is that he may be allowed to vest the lands in his name. The other prayers sought are on payment of late charges consequential to a delayed registration. These are ancillary reliefs. From these facts, I can see no legal issues of public importance here. I also find that the plaintiff's so-called challenge of a decision by a public authority (the respondents) to be nothing more than a collateral issue to the alleged infringement of the plaintiff's private rights.

[11] I therefore find that the procedural issue raised by learned counsel for the defendants is without merit. Accordingly, the respondents' contention that the plaintiff should have commenced its action by way of a judicial review is dismissed.

[12] Puan Nurul's only contention in respect of the second procedural issue mentioned in para. 7 above is that it is Nor Asyikin and not the plaintiff who is the registered owner. Against this one-liner are the following facts which were averred by the plaintiff in its affidavit in reply. The full purchase price has been paid and Nor Asyikin has executed Form 14A signifying her consent to have the land transferred to the plaintiff. Having made the payment, the plaintiff will suffer loss if the defendants are allowed to refuse to register the transfer of the land. Under such circumstance, the fact that it will be aggrieved qualifies the plaintiff to institute the present action. This is all the more so when the plaintiff's averments have not been disputed by the defendants.

[13] It is therefore my finding that the action is properly before me. I shall now turn to the substantive issues.

[14] Mr SK Ng, learned counsel for the plaintiff contends that the said 'Bumi Lot' should be distinguished from a Malay Reservation Land. He submits that the Bumi Lot endorsement is invalid as it is without legal basis. Furthermore, the restriction is a discrimination on ground of race against the plaintiff and, therefore, unconstitutional. He argues that it is a breach of art. 8 of the Federal Constitution. In the alternative, even if the court opines that the endorsement is legal, the endorsement binds only Guthrie as the undertaking to reserve the Bumi Lot was by Guthrie. The undertaking should not bind Nor Asyikin and/or the plaintiff.

[15] In considering Mr Ng's submission, I bore in mind the Federal Court decision in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135. In that case, Raja Azlan Shah Ag. CJ (Malaya) (as he then was) delivering the judgment of the Federal Court had this to say on the limits of the exercise of legal powers by State Authorities and the role of the courts to ensure that such exercise of powers are not exceeded (at p. 148):

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence,

this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442.)

[16] Guided by these words and after considering the parties' submissions, I find that it is imperative to determine, firstly, whether the respondents are in law empowered to impose the Bumi Lot endorsement. In the event that the answer to the first issue is in the affirmative, the next issue to be considered is whether they have acted within the limits of their powers. The third issue would be whether the Bumi Lot is unconstitutional.

[17] In respect of the first issue, Puan Nurul submits that the defendants are so empowered art. 153 of the Federal Constitution and s. 5 and s. 124 of the National Land Code ('NLC').

[18] Article 153 reads as follows:

Article: 153

Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak

153(1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority

charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

(4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This Article does not derogate from the provisions of Article 136

(6) Where by existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation:

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been *bona fide* carrying on, or authorise a refusal

subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

(8A) Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak.

(9A) In this Article the expression "natives" in relation to the State of Sabah or Sarawak shall have the meaning assigned to it in Article 161A.

(10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.

[19] Puan Nurul submits that the imposition of the Bumi Lot is part of the State's efforts in enforcing art. 153. In support of her argument, she refers to the Parliament Hansard of 6 April 1984 where Rais Yatim's speech on 'Rang Undang-undang Kanun Tanah Negara (Pindaan), appears as follows:

Dato' Rais Yatim : Terdapat beberapa cadangan yang apabila dilaksanakan akan dapat mencapai matlamat Dasar Ekonomi Baru sama ada secara langsung atau tidak langsung. Perakuan-perakuan yang diutarakan adalah ke arah menentukan supaya sebarang urusan mengenai tanah adalah sejajar dan tidak bercanggah dengan matlamat Dasar Ekonomi Baru, umpamanya dengan mengadakan peruntukan yang membolehkan Pihak Berkuasa Negeri mengadakan sekatan kepentingan apabila meluluskan permohonan tukar syarat tanah.

Peruntukan dalam seksyen 124(1) sekarang tidak merangkumi hasrat yang dimaksudkan. Bersesuaian dengan matlamat Dasar Ekonomi Baru dan juga dasar Kerajaan untuk mempastikan supaya Bumiputera dapat memiliki rumah-rumah kediaman, kebanyakan Kerajaan-kerajaan Negeri telah membuat dasar supaya pemaju-pemaju perumahan mengkhaskan sekurang-kurangnya 30% daripada petak-petak perumahan kepada Bumiputera.

A Walaupun dasar ini diterima tetapi pelaksanaan mengikut matlamat yang ditetapkan telah menempuh jalan buntu atau gagal sebab kawalan ke atas lot-lot tersebut adalah longgar. Satu cara bagi mengatasi masalah ini ialah dengan mengenakan sekatan kepentingan ke atas hakmilik-hakmilik yang dikhaskan kepada Bumiputera itu, supaya lot-lot tersebut tidak boleh dipindahmilik tanpa kebenaran Pihak Berkuasa Negeri.

B **[20]** Puan Nurul further submits that as the Bumi Lot is in line with the Federal Government's policy to maintain socio-economic stability, it cannot be considered *ultra vires* the Constitution. Thus, the plaintiff's only recourse is to apply to the State Authority to have the Bumi Lot restriction removed.

C **[21]** I find her submission untenable. It is trite that any act by the Executive must, regardless of how noble the intention behind the act may be, be founded on a legal and lawful provision. And, it is also necessary that the manner in which the power is exercised is also legally within the confines of the provision. At the sake of repetition, I refer once again to the words D of Raja Azlan Shah in *Sri Lempah (supra)*:

I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.

[22] A perusal of art. 153 shows that the quotas to be reserved under this E article relates only to positions in the Federal public service, scholarships, exhibitions and other similar educational or training privileges or special facilities given by the Federal Government and for trade or business permit or licence. There is no mention of lands.

[23] It is therefore, my finding that this provision does not support Puan F Nurul's submission that the defendants are empowered by art. 153 to order the Bumi Lot endorsement.

[24] I now turn to the NLC provisions which Puan Nurul contends support her submission and they are s. 5 and s. 124. Section 5 is the definition provision defining the State Authority. This issue is not being challenged G here. Is then the Bumi Lot endorsement permissible under s. 124?

[25] The learned author, Judith Sihombing, in *The National Land Code - A Commentary by LexisNexi*s explains the purpose of s. 124 (at p. XII 304) as follows:

H **[1802]**

The proprietor of alienated land – whether alienated under this Act or before the commencement of the Act, or approved for alienation but not alienated before the commencement of this Act – may apply to the State Authority to amend or vary any of the express conditions or restrictions I in interest to which the land is subject. It would seem that there is no

express barrier to the applicant where the proprietor is in breach of observance of a condition or restriction in interest. However, it is assumed that the existence of the breach would hinder the success of the application, at least until the breach has been remedied.

[1803]

This application may be made in respect of :

(1) the rescission or amendment of the express conditions under sections 120 to 123 as appropriate;

(2) the rescission or amendment of the conditions implied under section 119 (padi);

(3) the rescission or amendment of the conditions or restrictions in interest endorsed or referred to in the document of title: or

(4) the alteration of the category of land use to which the land is subject.

[1804]

The proprietor must obtain the consent, to his application, of any person who has a registered interest in the land or a tenant who has endorsed his tenancy from registration.

[1805] – [1850]

The variation will enable the proprietor to use or develop the land for purposed as approved, contrary to those originally imposed on the land.

[26] Section 124 was a subject of judicial interpretation in *Cayman Developments (K) Sdn Bhd v. Mohd Saad Long & Ors* [1999] 3 CLJ 601. The fact in that case was that one company identified as Syed Omar Al-Bukhary ('Al-Bukhary') had applied for a conversion of a piece of land under the category of 'agricultural/padi' land to 'residential' and 'commercial'. In approving the conversion, the State Authority of Kedah imposed a requirement that the low-cost houses to be built on the land should be sold at a discount of the RM25,000 price which should be RM23,750. The imposition of this requirement was pursuant to an exercise of the powers under s. 124 of the NLC. Cayman Developments (K) Sdn Bhd ('Cayman') subsequently took over the development of this land and upon completion, sold the houses at RM25,000. Premised on the discount requirement, the house purchasers instituted proceedings at the Sessions Court seeking the refund of the excess payment. The lower court entered judgment in favour of the purchasers. On appeal by Cayman, Mohd Hishamudin Yunus J (as he then was), in allowing the appeal, held (at p. 603):

Encik Manjit Singh, for the plaintiffs/respondents, put forth the basis of his clients' claim in the following manner. First, he contends that the State Authority has the power to impose the requirement as to the discount of five percent under s. 124 of the National Land Code. Second, he contends that Cayman, by not giving the discount, had breached that requirement. Third, he contends that because of this breach, the respondents/plaintiffs have the legal right to claim the discount of five percent from the defendant. In short, the foundation of the claim is not a breach of the sale and purchase agreement or the commission of any tort. Nor is it said that the cause of action was founded on the law of restitution or based on any provision of the Specific Relief Act. Rather, the foundation of the claim appears to be the breach of the requirement imposed by the State Authority on the vendor/developer, that is, Cayman, purportedly under s. 124 of the National Land Code.

The relevant parts of s. 124 read:

124. Power of State Authority to vary conditions, etc., on application of proprietor.

(1) The proprietor of any alienated land may apply to the State Authority under this section for:

(a) the alteration of any category of land use to which the land is for the time being subject.

(2) Where the State Authority approves any application under paragraph (a) of sub-section (1):

(a) it shall direct that the category of land used specified in the application be endorsed on the document of title to the land, and the existing category (if any) deleted, and …

(5) Any direction given by the State Authority under this section may be made conditional upon all or any of the following matters

(a) the payment of a further premium;

(aa) the payment of any other charges as may be prescribed;

(b) the reservation of a new rent;

(c) **compliance with such other requirements as the State Authority may think fit.** (emphasis added)

Clearly Encik Manjit Singh must have relied on sub-s. (5)(c) that I have just cited.

In the light of the approach adopted by Encik Manjit, the question thus arises as to whether under s. 124 of the National Land Code, the State Authority of Kedah, in approving the application for conversion, has the power to require Cayman to sell to the public each unit of the low-cost houses at a discount of 5% of the price of RM25,000.

> In my judgment, the State Authority has no power under sub-s. (5)(c) of the National Land Code to impose the requirement that I have mentioned on Al-Bukhary and Cayman when approving the application for conversion of land use of the land in question. The requirements regarding the price of each of the units to be sold to the public as well as the discount of 5% are not the kind of requirements envisaged by sub-s. 5(c) of the Code. In other words, the requirements are not within the powers of the State Authority to impose under that provision.
>
> I have no doubt whatsoever of the good intention of the State Authority, and that in prescribing the price and the discount, it certainly had in mind the interest of the low income section of the general public, who would constitute the potential buyers of the low-cost units. Yet, with the greatest respect, I do not think that Parliament, in enacting sub-s. (5)(c), had in mind to confer on the State Authority such a wide power so as to empower it to even fix the price of the low-cost units for the purpose of sale to potential buyers, let alone to prescribe any discount. In other words, the State Authority, acting under s. 124(5)(c), has no power or jurisdiction to impose requirements of such nature.

[27] I share the view of the learned judge in the interpretation of the limitations of the powers exercisable under s. 124 of the NLC. Any conditions imposed in the conversion exercise must relate to the category of land use. The provisions of s. 124 cannot be read to mean that the State Authority has the authority to impose the Bumi Lot restriction.

[28] I therefore find that learned counsel for the defendants have failed to show that the State Authority has the power to impose the Bumi Lot endorsement. What then is the effect of this unlawful imposition?

[29] In *Cayman (supra)*, Mohd Hishamudin Yunus J went on to hold (at p. 607):

> The requirements imposed are, in my judgment, *ultra vires*. This being the case, Cayman was not obliged to comply with such requirements. The company may ignore them, as it rightly did in the present case. The principle is clearly laid down in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37. In the case cited, the Federal Court held (p. 39):
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings: it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.
> >
> > In *Harkness v. Bell's Asbestos and Engineering Ltd.*, Lord Diplock LJ (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

A Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision.

> The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' [*Birmingham (Churchwardens and Overseers) v. Shaw* (at page 880 per Denman CJ)]. In *Barnard v. National Dock Labour Board* it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton LJ). *Ridge v. Baldwin* is to the same effect.

[30] *Cayman* was followed by Abu Bakar Kartar JC in *Nyong Chin Khean & Yang Lain lwn. Pendaftar Hakmilik Tanah, Kedah Darul Aman* [2015] 3 CLJ 1144.

[31] As I am of the view that the act of imposing the Bumi Lot endorsement is *ultra vires* s. 124, it follows then that the endorsement is a nullity. The endorsement must be ignored and cannot be permitted to stay on the title. The resultant effect is that there is no restriction on the land. The defendants cannot refuse the transfer on the ground advanced in the letter of 11 November 2015 appearing at para. 4 above. With this finding, it renders it unnecessary for me to consider the other issues.

[32] I therefore allow the plaintiff's prayers with costs of RM1,000.